UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman

In re:	)	
	)	
ALBERT LEON WHITE and	)	**Case No. 03-15860 HRT**
GWENDOLYN JUANITA WHITE,	)	
	)	**Chapter 7**
Debtors.	)	
	)	
	)	
LORETTA PARTEE,	)	
	)	
Movant,	)	
	)	
v.	)	
	)	
ALBERT LEON WHITE and	)	
GWENDOLYN JUANITA WHITE,	)	
	)	
Respondents.	)	

ORDER REGARDING RELIEF FROM STAY

THIS MATTER is before the Court on the Motion to Modify the Automatic Stay [the "Motion"] filed by creditor Loretta Partee ["Partee"], and the Debtors' Response. The final hearing on the Motion was held on February 13, 2004. Movant was given a day or two to file a corrected supporting brief and the Debtors, until February 23, 2004, to file a supplemental response. After considering the evidence, memorandum briefs and arguments presented by the parties, the Court is ready to rule.

FACTS

The relevant facts and procedural background of this case are:

1. The Debtors filed a chapter 7 petition on April 3, 2003.

2. Prior to the filing of this chapter 7 case, Partee had filed an action , which is currently pending in the Circuit Court of Cook County, Illinois, captioned *Loretta Partee v. Albert L. White and Gwendolyn J. White*, Case No. 02 CH 14729 [the "Illinois Action"].

3. In this chapter 7 case, Partee has objected to the Debtors' claimed exemptions, which the Court has held in abeyance following a preliminary hearing on that matter.

4. On or about July 11, 2003, Partee commenced an adversary proceeding by the filing of a complaint seeking to deny the Debtors' discharge. After initially being assigned to Judge Elizabeth Brown, the adversary proceeding has been transferred to Judge Michael E. Romero, pending as Adversary Proceeding No. 03-1541 MER [the "Adversary Proceeding"]. That Court presently has issues pending before it, including Partee's First Amended Complaint under Sections 727 and 523, the Debtors' Motion to Dismiss Partee's claims, and Partee's Motion to Stay the Adversary Proceeding to permit the Illinois Action to go forward.

5. The Debtors' Schedules list $35,000.00 equity in the Polk Street property located in Chicago, Illinois. The property is listed at a $200,000.00 value with liens of $165,000.00. This is the property which is in dispute and the subject of the Illinois Action. The Debtors did not claim an exemption on this property.

6. The complaint in the Illinois Action states mostly equitable counts to establish (a) equitable mortgage; (b) constructive trust; (c) quiet title; and (d) an accounting. It also states causes of action for (e) fraud; (f) theft of title; and (g) punitive damages.

7. Partee alleges that she was fraudulently induced to grant the Debtors a quitclaim deed(s) to the Polk Street property and the Debtors obtained a series of secured loans against the property, eliminating any available equity and subjecting the property to foreclosure. The Adversary Proceeding before Judge Romero states a §523(a)(2) fraud count; a §727(a)(3) failure to preserve records count; and, a §727(a)(5) failure to account for property count.

DISCUSSION

Partee seeks relief from stay to proceed with the Illinois Action to obtain 1) a decision on the ownership of the property; and 2) a judgment against the Debtors for fraud, theft or other inequitable conduct. If successful, Partee would then seek to have such Illinois judgment given preclusive effect in the Adversary Proceeding pending before Judge Romero.

The Debtors request that relief from stay be denied. Among other things, they assert that Partee's §727 and §523 claims are core matters within the exclusive jurisdiction of the Bankruptcy Court and should be addressed in the Adversary Proceeding, not the Illinois Action.

At hearing, the Debtors also argued that Partee had not met her burden of proof to entitle her to relief from stay. Section 362(g) provides that, in any relief from stay hearing under § 362(d) or § 362(e),

> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

11 U.S.C. 362(g).

Where equity is not an issue, such as is the case here, §362(g)'s allocation of the burden of proof may appear to create a presumption that relief from stay is appropriate unless the Debtor affirmatively refutes that cause exists. *See In re Wolsky*, 53 B.R. 751, 756 (Bankr. D. N.D. 1985) ("On first blush, section 362(g) of the Code may lead one to believe that a creditor, by simply proving lack of equity in a debtor's property, has carried its burden of proof with respect to a 362(d) motion for relief from stay . . ."); *In re Shawver*, No. 89-11717, 1991 WL 11002444, at *1 (Bankr. S.D. Ga. May 17, 1991) ("Under a § 362(d)(1) 'for cause' theory for relief, debtors' equity is not at issue. Therefore, the debtors bear the full burden of proof in opposition to the relief as requested."). However, the majority of courts explicitly reject that reading. *Wolsky*, 53 B.R. at 756 ("A creditor commencing an action for relief from stay has the initial burden of proving a prima facie case; cause must be shown to exist."); *In re Curtis*, 40 B.R. 795, 802 (Bankr. D. Utah 1984) ("This Court holds that one who seeks relief from the automatic stay must, in the first instance, establish a legally sufficient basis, i.e., 'cause,' for such relief"). In Colorado, this burden of proof standard was also articulated in the case of *In re Unioil*, 54 B.R. 192 (Bankr. D. Colo. 1985), where the Court stated:

> Absent any issues concerning the debtor's equity in property, it follows that the debtor has the burden of proof in opposing motions for relief from stay. *In re Highcrest Management Co., Inc.*, 30 B.R. 776 (Bankr. S.D. N.Y. 1983). Once the party seeking relief from stay establishes a legally sufficient basis, i.e., "cause," for such relief, the burden then lies with the debtor to demonstrate that it is entitled to the stay. *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984).

Unioil, 54 B.R. at 194.

This Court believes these decisions establish the correct standard in requiring the creditor to present a *prima facie* case before the burden shifts to the debtor. To hold otherwise would be at variance with virtually all other Code sections that place a heavy burden on creditors. Under § 362(g), the creditor must make a *prima facie* showing and Partee has met her burden. The Court's file and the hearing submissions establish some basic, but legally sufficient facts that carry Partee's burden of making a *prima facie* case for cause under 11 U.S.C. § 362(d)(1):

1. An action has been filed in Illinois.
2. There is no dispute that fraud is an issue in that case.
3. An adversary action is pending here that also addresses fraud as well as other issues.
4. Debtors are chapter 7 debtors and this is a no asset estate.
5. The Debtors have enjoyed the benefits of the automatic stay for over eleven (11) months

Courts have identified the following factors to consider in determining whether or not cause exists to lift the stay to allow state court litigation to proceed. These are commonly referred to as the *Curtis* factors:

> (1) Whether the relief will result in a partial or complete resolution of the issues.
> (2) The lack of any connection with or interference with the bankruptcy case.
> (3) Whether the foreign proceeding involves the debtor as a fiduciary.
> (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.
> (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation.
> (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.
> (7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.
> (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c).
> (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f).
> (10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties.
> (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.
> (12) The impact of the stay on the parties and the "balance of hurt."

Curtis, 40 B.R. at 799-800 (citations omitted).

Several *Curtis* factors such as (3) whether debtor acts in a fiduciary capacity; (5) whether insurance is available and an insurance carrier has assumed responsibility, making the debtor a nominal party; (6) whether the action essentially involves third parties, and the debtor is only a bailee or conduit; (8) whether the possible judgment obtained from the foreign proceeding is subject to equitable subordination; and (9) whether the foreign proceeding might result in a judicial lien which is avoidable under §522(f), primarily address situations where the state court action is only tangentially related to the bankruptcy estate. These *Curtis* factors are neutral or inapplicable in this case because there is no longer any estate interest to protect at this late stage of the case. None of them weigh in favor of maintaining the stay.

The remaining *Curtis* factors are relevant to this case and all of them weigh in favor of lifting the stay:

(1) *Whether the relief will result in a partial or complete resolution of the issues.*

While there is some overlap between the Illinois Action and the Adversary Proceeding, it is clear that all of the issues between these parties are not going to be resolved in either forum. Granting relief from stay will allow the underlying issues regarding the ownership of the property located in Illinois to be addressed in that forum. Those are equitable issues that are in the most urgent need of resolution and they are issues that the Colorado Bankruptcy Court will not determine. By the same token, the discharge and dischargeability matters fall under the exclusive jurisdiction of the Bankruptcy Court and the final decisions on those issues will be made in the Adversary Court. The sad truth is that neither party is financially situated to litigate in two places, but the parties' ability to achieve complete relief will ultimately require them to do so.

(2) *The lack of any connection with or interference with the bankruptcy case.*

Allowing the Illinois Action to proceed does not interfere with the main bankruptcy case. The only matter pending in the main case is the exemption issue. There is no relationship between that issue and any of the state court causes alleged in the Illinois Action.

(4) *Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.*

The Illinois Action is being heard in the Chancery Division of the Circuit Court of Cook County, Illinois. Although that is not a specialized tribunal, as such, it is a division of the Circuit Court that is specially designated to hear the types of equitable issues that are involved in the Illinois Action. In addition, as a matter of comity, the Illinois state courts have a particularized interest in determining disputes and issues regarding real estate located within their jurisdiction.

(7) *Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.*

There are no other interested parties to the bankruptcy that would be prejudiced by allowing the Illinois Action to continue. Since the Trustee has filed his no asset report, neither the Trustee nor the general creditors have any interest in the litigation whatever.

(10) *The interest of judicial economy and the expeditious and economical determination of litigation for the parties.*

The ownership issues and the fraud issues have all been pleaded in the action which is currently pending in the Illinois court. The interest of judicial economy would be served by allowing the Illinois courts to try all of those issues in one forum and then return to the bankruptcy court to address the issues which are particular to the discharge and dischargeability questions which are pending here. After the Illinois Action has been completed, it is likely that collateral estoppel can be applied to make it unnecessary to relitigate some of the factual issues

that will be addressed in that case and significantly narrow the scope of the proceedings remaining to be conducted in this forum.

> (11) *Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.*

Although it does not appear that the Illinois Action is ready for trial, the Adversary Proceeding is certainly no further developed than the Illinois Action.

> (12) *The impact of the stay on the parties and the "balance of hurt."*

The Debtors are not materially prejudiced by allowing the continuation of the Illinois Action. However, the prejudice to the Plaintiff of allowing the stay to remain in place is significant. If the stay is not lifted, the evidence will be presented in Judge Romero's court and then essentially the same case would have to be presented in the Illinois court because Judge Romero would not have any occasion or jurisdiction to decide the equitable title issues. The Plaintiff would be put to the burden of trying an Illinois-based case in Denver with the expense of transporting witnesses to this jurisdiction. If tried first in Illinois, the Debtors would incur like expense. However, if it is tried first in Illinois, some of the factual findings in the state court fraud action may also be applicable to the §523 or the §727 counts and the remaining need for evidence in the Adversary Proceeding may be significantly narrowed. As to the Debtors, they will certainly benefit from having the stay in place because the need to defend in Illinois is delayed. In addition, the Court is aware from the evidence that the Debtors may benefit from a further delay, since currently, Mr. White has health problems which may adversely effect his ability to mount a vigorous defense in Illinois, and possibly even in Colorado. However, these are not benefits that the Code is intended to confer. Eventually, they will have to try the issues concerning title in that jurisdiction in any event.

In *Curtis*, the court states that

> the most important factor in determining whether the grant relief from automatic stay to permit litigation against the debtor in another forum is the effect of such litigation on the administration of the estate. Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit.

Curtis, 40 B.R. at 806. But that is the bottom line in this case. There is no estate. Except for allowing the Debtors a few months of breathing room at the beginning of the case, the Code is not intended to provide post-petition protection to a chapter 7 debtor for the long term. The primary *Curtis* factor to consider in chapter 7 is the effect on the estate and, in this case, there is no effect on the estate.

Furthermore, the automatic stay has served its function in this case. The reasons for the automatic stay are twofold. It allows the debtors an important breathing spell, but it also protects the creditors by insuring that assets of the estate are not dissipated. *See, e.g., Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987) ("The purpose of the automatic stay provided by 11 U.S.C. § 362 is to protect the debtor and his creditors by allowing the debtor to organize his affairs, and by ensuring that the bankruptcy procedure may operate to provide an orderly resolution of all claims."); *Reliant Energy Services, Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) ("The purposes of the bankruptcy stay under 11 U.S.C. § 362 'are to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse.") (quoting *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985)); *Curtis*, 40 B.R. at 798 ("The automatic stay implements two goals. First, it prevents the diminution or dissipation of the assets of the debtor's estate during the pendency of the bankruptcy case. Second, it enables the debtor to avoid the multiplicity of claims against the estate arising in different forums.").

As noted above, this is a "no asset" chapter 7 case. There is no interest of the estate to protect because there is no estate. The Trustee has examined the debtor's affairs and determined that there is no property to be collected and distributed to creditors. As a result, there is no interest whatever of creditors that would be served by maintaining the stay in effect.

Likewise, these debtors have received their "breathing spell" and then some. The one and only reason that the automatic stay remains in effect is that Ms. Partee has challenged the Debtors' right to receive a discharge in this case. In an individual chapter 7 case, where the right to discharge has not been challenged, a discharge would issue approximately sixty (60) days after the original § 341 meeting date. FED. R. BANKR. P. 4004(c)(1). Thus, the vast majority of individual chapter 7 debtors receive a "breathing spell" of approximately ninety (90) days as opposed to the eleven (11) months that these Debtor's have enjoyed.

Finally, the Court must address the Debtors' specific arguments for denying relief from stay. Debtors disagree with Judge Brown's rulings at the initial status conference in the Adversary Proceeding, recommending the filing of this Motion for Relief From Stay to seek permission to proceed with the Illinois Action first and then address the dischargeability and denial of discharge matters in the Adversary.

Citing the U.S. Supreme Court case of *Brown v. Felsen*, 442 U.S. 127, 99 S. Ct. 2205 (1979), the Debtors argue that the §523(a)(2)(A) claim, should it survive the Motion to Dismiss, must be tried in Bankruptcy Court. But *Brown* stands for the proposition that the *res judicata* effect of a prior state court judgment cannot be invoked to foreclose litigation of a dischargeability issue, which was not specifically addressed in the prior judgment. *Id.* at 132-39, 2210-13. While it is not unlikely that the prevailing party in the state court litigation will seek to use collateral estoppel to limit relitigation of certain factual issues that may necessarily be decided in the state court action, it is the Bankruptcy Court that will make the final determination

on the § 523 and § 727 claims. In any case, that is an argument involving the potentially differing standards of proof between the state court causes and the dischargeability causes of action. It is an issue that will by addressed by the Adversary Proceeding Court in making its determination of whether or not to allow the use of collateral estoppel in that case.

Debtors further argue that the claims raised in Plaintiff's Amended Complaint dated November 10, 2003, are time-barred and subject to a Motion to Dismiss filed by the Debtors. This issue is not before this Court and is a matter for the Adversary Proceeding Court. If Debtors are successful there, the Adversary matters to be handled may be significantly reduced.

Finally, Debtors argue that granting relief from stay will effectively stay any hearing on the §727 causes of action pending a decision in the Illinois Action while allowing the § 523 action to be determined in the state court. Whether to proceed or not proceed with §727 matters separately, while waiting on the §523 causes, should some or all survive the Debtors' Motion to Dismiss, is a matter for the Adversary Judge to decide. Clearly, the §727 actions will not be tried in state court. However, some of the underlying facts to be determined there may ultimately have relevance in the Adversary Proceeding both with respect to the § 523 action and the § 727 action.

The Debtors argue that denying relief from stay will require these maters to be litigated only once. The Court disagrees. The Adversary Proceeding will deal with the narrow issues of discharge and dischargeability. It will not determine the parties' rights and interests concerning the Polk Street property. Those issues, while vital to the parties, are not of any interest or importance to the chapter 7 trustee or the estate.

All of these are matters capable of being addressed by the Adversary Proceeding Court should any non-dischargeability cause remain after the state court's determination on Debtors' alleged fraudulent conduct. At that point, the Adversary Court can engage the presumption of narrowly construing exceptions to or the denial of the discharge in reaching its findings and conclusions.

Underlying all of Debtors' arguments seems to be the fear that granting a lift of stay in this case is tantamount to a cession of the Bankruptcy Court's exclusive jurisdiction to adjudicate discharge and dischargeability issues to the state courts. There are two problems with that argument: 1) it misconstrues the nature of the concerns addressed by the automatic stay; and 2) it confuses the role of the Court with respect to the main bankruptcy case with the role of the judge in the Adversary Proceeding.

The automatic stay's primary concern is preservation of assets of the estate; it is secondarily concerned with giving a breathing spell to the debtors. As noted above, the purposes of the stay have been met and there simply is no proper interest of the automatic stay to be preserved by maintaining the stay in effect in this case.

The Debtors' concerns with respect to the proper role and jurisdiction of the state court vis-a-vis the Bankruptcy Court fall far outside the purview of this automatic stay litigation. Those are issues that are properly addressed by Judge Romero in the Adversary Proceeding. That jurisdictional argument also confuses the proper respect that federal courts accord to relevant factual determinations made in state court litigation with the Bankruptcy Court's unquestioned duty to make the ultimate decision on the discharge and dischargeability actions over which it does exercise exclusive jurisdiction. In any case, it is the role of Judge Romero, in the Adversary Proceeding, to determine whether, and to what extent, to stay the litigation in his court while the state court litigation proceeds. This Court will not presume to make those decisions for him.

CONCLUSION

On balance there appears to be no reason to continue the automatic stay in place. There is no asset of the estate or process of the Bankruptcy Court that is impacted by lifting the stay. Also, where no property of the Debtors or the estate is impacted and no court processes are interfered with, the only remaining interest with which the Court should concern itself is the breathing spell provided to the debtor upon filing of the case. But, in an individual chapter 7 case, that interest fades fast. In and of itself, that interest now provides no justification for maintaining the stay eleven (11) months after the petition date.

DATED this 12TH day of March, 2004.

BY THE COURT:

Howard Tallman

Howard R. Tallman, Judge
United States Bankruptcy Court